

The Italian Constitutional Court in re Taricco: “Gauweiler in the Roman Campagna”

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A new chapter of the so-called judicial dialogue was opened on 26 January 2017 by the Italian Constitutional Court (ICC) through the submission of a reference for preliminary ruling (order 24/2017) to the Court of Justice of the European Union (CJEU). The submission challenged the *Taricco* case law of the CJEU (Case C-105/15 decided in 2015). In the case at issue, Mr. Taricco was accused with others of having committed serious VAT fraud by trading Champagne through simulated transactions using different companies and shell companies. According to Italian national law, such frauds constituted a criminal offence. The Italian Court that was prosecuting Mr. Taricco and others submitted a reference for preliminary ruling to the CJEU, asking whether the rules provided by the Italian criminal code on statutory limitation were in accordance with EU law. The Italian Court suspected that the applicable national rules on limitation periods, modified by the Italian legislator in 2005, provided an excessively early time-barring effect, thus limiting or *de facto* impeding the Court's ability to prosecute those crimes. The CJEU, partially reformulating the referring Court's question, referred in particular to Article 325 TFEU to specify that EU Treaty law imposes a precise, clear and unconditioned obligation to provide for effective and dissuasive penalties for EU fraud. In the CJEU's view, the effectiveness and dissuasiveness of the Italian system of criminal penalties for VAT fraud could be impeded by the concrete application of rules on statutory limitation. In fact, given the usual complexity and duration of the criminal proceedings in fraud cases, the applicable absolute admissible extension of the limitation period – i.e. no more than a quarter of the initial duration, amounting to seven years – may lead to a *de facto* impunity. Moreover, the CJEU noted that the national rule on the limitation period was incompatible with EU law as long as it did not apply to similar cases of VAT evasion affecting the Member State's own financial interests, and thus infringing the principle of equivalence enshrined in Article 352(2) TFEU.

The impact of the CJEU judgment in *re Taricco* on the Italian legal order was potentially devastating. In fact, national courts had to guarantee the application of the CJEU's decision, if need be with the disapplication of the domestic provisions regulating the maximum extension of the limitation period, in order to allow the effective prosecution of the alleged crimes. This consequence was particularly problematic in the Italian legal system, given the fact that, according to a well-settled case law, the limitation period was considered an institution of substantive criminal law, thus to be included within the scope of application of the principle of legality in criminal matters. On the contrary, the CJEU interpreted the limitation period primarily as an institution of procedural law, therefore out of the scope of the (European) principle of legality. The CJEU finally concluded that “the acts which the accused are alleged to have committed constituted, at the time when they were committed, the same offence and were punishable by the same criminal penalties as those applicable at present” (§ 53 of the *Taricco* judgment).

Several Italian courts were of a different opinion, and invoked the jurisdiction of ICC

referring four different questions to the Court, two of which originated from the Supreme Court of Cassation. In principle, the ICC concedes that European legislation and other European acts (CJEU's decisions included) prevail over national legislation and can even derogate from the Constitution. In these cases, European acts may not be challenged before the ICC. These principles have a residual and limited exception, namely the violation of the fundamental principles of the Constitution. Only in these cases, the Constitutional Court retains jurisdiction and, in line with the well-known European case-law of the *Bundesverfassungsgericht*, declares itself competent to intervene in protection of the core principles of the Italian constitution. The courts referring the question to the ICC claimed that *Taricco* case law, and thus the disapplication of the upper limit of the period of limitation, was incompatible with the supreme principle of legality in criminal matters and more precisely with the principle of prohibition of retroactive application of criminal law *in malam partem*. The ICC was asked to apply its counterlimits doctrine (protecting Italian constitutional identity), virtually dating back to the Frontini Judgment of the ICC (183/1973), but concretely never applied to EU law (and thus recalling the *Karlsruhe* “dog that barks, but never bites”). The question which has been submitted to the Constitutional Court by the Court of appeal moved from the assumption that the statute of limitation bears substantive nature. Therefore, its application, interpretation and modification need to comply with a strict conception of the principle of legality in criminal matters, as enshrined by Article 25, second paragraph, of the Italian Constitution (“no punishment may be inflicted except by virtue of a law in force at the time the offence was committed”). In the referring judges’ view, the disapplication of the upper limit of the limitation period would infringe the principle of non-retroactivity of criminal law, and therefore violate a fundamental principle of the legal order.

The referral orders generated an unprecedented debate in the Italian legal scholarship with regard to a pending case. Workshops, conferences, blog posts, journal case-notes as well as articles and edited books overwhelmed a scholarly debate that was extremely lively in the Italian legal order, although rather limited in the European scholarship, in which, apart from a few blog posts (*Peers* and *Lassalle*), the *Taricco* judgement of the CJEU went almost (see *Billis* and *Timmermann*) unnoticed.

In its decision to submit a preliminary reference (and request to follow an expedited procedure according to Article 105 of the CJEU rules of procedure), the ICC did not follow the most radical positions of the Italian legal scholarship that claimed the violation of Italian constitutional identity and asked the ICC to declare such violation with no hesitation. On the other hand, the ICC did not follow the opposite position either, which affirmed that no fundamental principles were at stake, and that the CJEU case-law in *re Taricco* was plainly compatible with the Italian constitutional identity.

The ICC followed a third way by submitting its reference to the CJEU. The reasoning of its referral order recalls the *Gauweiler* saga, even though with milder tones. The ICC basically confirmed its interpretation of the limitation period as an institute of substantive law, therefore to be included within the scope of the constitutional principle of legality in criminal matters. The ICC conceded that in many other Member States the limitation period is considered as a procedural institution and therefore out of the scope of application of the principle of legality. In the ICC’s view, given the fact that limitation periods are not matter of

EU competence, “there is no need for uniformity at the European level on this point” (referral order, § 6): no need for uniformity means, in the case at issue, no need to adopt a procedural understanding of the limitation period. In its reasoning, the ICC does not challenge the CJEU’s interpretation of Article 325 TFEU, but assumes that national judges should not apply CJEU’s decisions when they clash with fundamental principles of the national constitution. However, the ICC “considers in any case appropriate to raise such a question to the CJEU” (referral order, § 6). After a relaxing introduction of its arguments, where the European composite constitution is depicted in a rather irenic way, the Court notices that primacy of EU law mirrors the idea that the objective of unity in EU law necessarily requires a minimum tolerance of diversity in a legal system that is characterized by pluralism. In the ICC’s view, this tolerance is necessary to preserve national constitutional identities of Member States, “inherent in their fundamental structures, political and constitutional” (Article 4(2) TEU). Otherwise, so says the ICC, “EU Treaties would contradictory aim at dissolving the constitutional foundation from which they origin thank to the Member State will” (referral order, § 6). In the ICC’s view, it follows that no CJEU decision may be interpreted in the sense that it imposes the surrender of the supreme principles of any national constitutional order. While it is up to the CJEU to interpret EU law, national Constitutional Courts retain their competence at interpreting national constitutional identities. In this case, the ICC affirms, rather apodictically, that a substantive understanding of limitation periods is part of the national constitutional identity of Italy. In support of this, the ICC refers to the CJEU judgement in *re Taricco*, where it states that “if the national court decides to disapply the national provisions at issue, it must also ensure that the fundamental rights of the persons concerned are respected” (§ 53 of the *Taricco* judgment). In the ICC’s view, the CJEU meant that its interpretation of Article 325 TFEU may only be applied if compatible with national constitutional identity, and Member States are charged with this test. Nonetheless, the ICC asked the CJEU to “confirm” this interpretation (§ 7 of the referral order). Should the CJEU confirm the ICC’s interpretation, there would be no conflict between EU law and constitutional identity, and the constitutional question should be considered unfounded. However, the ICC added that Italy could still be considered responsible for the violation of the duties imposed by Article 325 (§ 7 of the referral order). This specification is far from providing any clarification: on the one hand, the disapplication on the *Taricco* case law is imposed by the Italian national constitutional identity, on the other hand Italy remains apparently responsible for its violation of EU law.

This said, the weakest part of the ICC’s reasoning is the one where the Court apodictically assume that the principles at stake are part of the Italian national constitutional identity. In fact, according to the ICC’s previous case law, constitutional identity only consists of the essential core of the fundamental principles of the constitutional order, and not of their contingent implementation (in this sense, judgement 1146/1988). Although the principle of legality in criminal matters may certainly be included among the fundamental principles of the legal order, it may be reasonable to include in its essential core only rules that define crimes and penalties and not limitation periods. This point was completely overlooked by the ICC, with the paradoxical consequence of apparently including the extremely critic and harshly criticized regulation that reduced limitation periods in 2005 among the “historic national achievements” in the field of fundamental freedoms (referral order, § 8). Within this picture, also the reference to the Omega case of the CJEU seems to be inappropriate.

Finally, the ICC noticed that the CJEU's *Taricco* judgement failed to consider a corollary of the legality principle enshrined in Article 49 of the Charter, and thus the sufficient determination of any criminal provisions, regardless of their substantive or procedural nature. According to this corollary, tightly connected to the separation of powers principle, judges should apply sufficiently determined legal provisions in criminal matters, and this would not be the case with the effect of the CJEU interpretation of Article 325 TFEU in criminal matters. This part of the ICC's raises very serious concerns, but it openly contradicts the general premises of the ICC's decision, stating that the interpretation of EU law is a matter of the CJEU.

Now the ball is back to the CJEU. Although the ICC's judgement is worded in apparently much milder terms than the *BVerfG*'s preliminary reference in *Gauweiler*, the content of the ICC's decision seems loaded with much more dynamite. In *Gauweiler*, the CJEU was called to interpret an act of another EU institution: in *Taricco*, the CJEU is called to reinterpret its own decision, after the ICC essentially asked "please, say it again?". We shall now see whether the CJEU will "say it again" in a way that the ICC will consider compatible with a (apodictically affirmed) peculiar notion of constitutional identity.

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